

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DASARATHI RAGHUNATH,

Petitioner,

No. C 07-6285 PJH (PR)

vs.

ORDER OF DISMISSAL

EDMUND JERRY BROWN, Attorney
General,

Respondent.

This habeas petition was filed by a detainee at the Eloy Detention Center in Eloy, Arizona. The petition, which is brought under 28 U.S.C. § 2254, is directed to petitioner's criminal conviction in Santa Clara County, which is in this district.

In the petition Raghunath challenged a conviction which was entered in 1992 pursuant to a plea of guilty to the felony of annoying a child, see Cal. Penal Code § 647.6, and to the misdemeanor of indecent exposure, see Cal. Penal Code § 314. Sentence was suspended and petitioner was placed on probation for three years. In 2004, having successfully completed probation, the criminal record was expunged.¹ Petitioner is now detained by ICE for deportation because of the conviction.

In its initial review order, the court noted that the United States Court of Appeals for the Ninth Circuit has addressed the issue of whether a petitioner who is no longer "in custody" on the state sentence and is held for deportation can attack the sentence by way of a habeas petition under Section 2254, like this one, or perhaps by way of a petition

¹ Petitioner does not say why the expungement was so long after completion of probation.

1 under 28 U.S.C. § 2241. See *Resendez v. Kovensky*, 416 F.3d 952 (9th Cir. 2005). The
2 court held that neither is permissible. *Id.* at 961. Petitioner therefore was ordered to show
3 cause why the case should not be dismissed on the authority of *Resendez*. He has
4 responded.

5 Petitioner argues that he is in custody as a result of the state conviction, albeit
6 indirectly; this argument, however, is meritless in light of *Resendez*. He also argues that he
7 is not attacking his order of removal, but rather is attacking the state conviction. This
8 misses the point, which is that he is not “in custody” on the state conviction, so does not
9 meet the statutory “in custody” requirement. His contention his ineffective assistance claim
10 is the same as a claim that counsel was not allowed is clearly incorrect. And the court
11 need not withhold ruling pending a decision by the California Supreme Court on a similar
12 state law question, because there is a controlling Ninth Circuit case, *Resendez*, resolving
13 the federal question. For these reasons, petitioner has failed to show cause why the
14 petition should not be dismissed.

15 The petition is **DISMISSED**. The clerk shall close the case.

16 **IT IS SO ORDERED.**

17 Dated: July 31, 2008.



PHYLLIS J. HAMILTON
United States District Judge